

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

LLOYD A. HERMAN,

Appellant,

v.

DEPARTMENT OF ECOLOGY and
SPOKANE COUNTY,

Respondents.

SHB NO. 04-019

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

A hearing was held in the above matter on May 12, 13, and 16, 2005. The first two days were held in Liberty Lake, Washington. The third day was held in Lacey. The Shorelines Hearings Board was comprised of William H. Lynch, Bill Clarke, David W. Danner, O'Dean Williamson, Judy Wilson, and Dan Smalley. Mr. Lynch did not attend the third day of the hearing due to illness, but listened to the recording for that day of the proceeding. Administrative Appeals Judge Kay M. Brown presided over the hearing. Gene Barker and Associates of Olympia, Washington provided court-reporting services. The Petitioner, Lloyd A. Herman (Herman) appeared through his attorney, Dennis D. Reynolds. Respondent Department of Ecology (Ecology) appeared through its attorney, Assistant Attorney General Thomas J. Young. Respondent Spokane County (County) appeared through its attorney, Martin D. Rollins, Deputy Prosecuting Attorney.

1 On the morning of the first day of the hearing, the Board conducted a site visit with all
2 parties present. The Board also received sworn testimony of witnesses, exhibits, and argument
3 on behalf of the parties. Having fully considered this record, the Board enters the following:

4 FINDINGS OF FACT

5 I.

6 Mr. Herman owns a piece of steeply sloped property on the shores of Liberty Lake. The
7 property is located in a shoreline area designated “urban” under Spokane County’s Shoreline
8 Master Program (SCSMP). Mr. Herman purchased the property from his father in 1970, at
9 which time the property was developed with a single-family residence, a dirt and timber trail
10 with steps down to the beach, a rock bulkhead, and a platform and dock. Retaining walls made
11 from creosoted timbers and a few large trees reinforced the slope leading down to the lake.

12 *Testimony of Herman, Anest, and Moser. Exs. R-8 and R-15.*

13 II.

14 During the 1970’s, Mr. Herman made several changes to the property. He added a boat
15 crane and lift, which were anchored in a pier made out of cement and rocks. The pier was placed
16 on top of a natural-occurring rock area in the lake. He also added a deck on the south side of the
17 pier that was approximately 18 feet by 18 feet and was supported by pier blocks. It overhung the
18 existing bulkhead by approximately four feet. His improvements also included a structure on the
19 deck that was plumbed for a toilet. *Testimony of Herman, Crowley, and Corp. Exs. R-8 and R-*
20 *15.*

1 III.

2 In the early 1990's, Mr. Herman made more changes to the property. He tore out the old
3 deck, and replaced it with a larger deck that was 22 feet by 22 feet. He also rebuilt the
4 foundation under the deck, replacing the pier blocks with rock from the beach. He added a roof
5 to the deck that was supported by 8-foot high posts, and which served as a second deck. For
6 safety reasons, he replaced the wooden steps at the end of the deck with wider concrete steps.
7 All of these changes were made without seeking a shoreline permit from the County. *Testimony*
8 *of Herman, Anest, Maher, Moser, Crop, Sing, Thaiss, and Crowley. Exs. R-2, R-8, and R-15.*

9 IV.

10 Mr. Herman's activities came to the attention of Department of Ecology in
11 1993. After investigating, the Ecology issued an enforcement order and penalty to Mr. Herman
12 dated September 27, 1993. Ex. R-4. The order was appealed to the Board. The parties reached
13 a settlement prior to hearing. The settlement was contained in a Stipulation and Agreed Order of
14 Dismissal for Lloyd A. Herman dated May 4, 1995, and was signed by both Ecology and Mr.
15 Herman. *Ex. R-5.*

16 V.

17 The settlement agreement provided the following:

- 18
- 19 1. The concrete steps and platform shall remain. The appellant shall entirely remove the
20 historic lift and crane to create shallow water fish habitat. If required, the appellant
21 will obtain an HPA prior to beginning work for the removal of the crane and lift and
22 that portion of the bulkhead described in section 2. The appellant also shall remove
the fill and stacked rocks under the newly constructed portion of the deck.

2. Appellant shall remove the retaining wall or bulkhead twelve feet from the maple tree located next to the north property line.
3. Appellants shall remove the eastern half of the deck cover and the two eastern supporting poles shall be cut off flush with the decking. Appellants may construct a storage shed with a height no more than eight feet, a width no more than the width of the deck, and a depth no more than eleven feet, four inches. Appellant will paint or stain the deck in nontoxic, earth tones.
4. Appellant shall plant native vegetation consistent with the pedestrian trail for stabilization of the bank. Vegetation may include shrubs, trees, and low-growing vegetation.
5. Ecology will rescind the penalty of \$1,000.¹

Ex. R-5.

VI.

Following the entry of the settlement agreement, Mr. Herman made more changes to the property. These changes included modifying the deck by moving the fill and rock foundation from under the deck about two to four feet landward, replacing the wooden deck with a concrete slab, removing two of the existing poles on the waterward side of the deck that held up the deck roof, and replacing the remaining supporting poles with steel. The cover of the deck was replaced with a much larger peaked roof, approximately 15 feet high. The roof is designed to channel water off into the vegetated area behind the deck structure. The covered deck was enclosed to create a structure that is approximately 18 feet by 18 feet, painted a taupe color, and trimmed in white. It currently contains a kitchen sink, toilet, shower, refrigerator, tables, chairs, and a concrete patio. The steps going down to the dock from the deck structure were widened by

¹ Two additional provisions addressed attorney's fees and cost, and settlement authority.

1 the addition of two short sets of side stairs down to the beach. *Testimony of Herman, Sing, Corp,*
2 *Crowley, Maher, and Moser. Exs. R-12, R-15, R-17 and R-18.*

3 VII.

4 On the north side of the property line, Mr. Herman mortared the existing bulkhead and
5 installed a concrete “cap” on top. The cap formed a concrete walkway along the lakefront. This
6 work increased the height of the bulkhead by the approximate 6-inch thickness of the concrete
7 cap, but did not relocate the bulkhead waterward. The walkway runs from the north property
8 line to the pavilion structure, and has an iron railing and lights. *Testimony of Herman, Sing,*
9 *Corp, Crowley, Maher, and Moser. Exs. R-12, R-15, R-17 and R-18.*

10 VIII.

11 A number of trees on the hillside have been lost since the 1970s. There has also been
12 settling of the foundation of the Herman house, as evidenced by cracks in the walls and difficulty
13 opening doors and windows. Both of these facts are evidence of slope stability concerns. In
14 response, Mr. Herman undertook construction to stabilize the steeply sloped hillside on the
15 property. He did not seek permits from Spokane County or Ecology. The work that was done
16 was substantial, and it was not done pursuant to a plan drawn by an engineer.² All of the work
17 was done by hand.³ The bank stabilization work consisted of removing all of the creosoted
18 railroad ties that supported the trail and constructing 13 keystone retaining walls in their place.
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21 ² Mr. Herman’s contractor had drawn a plan, however, which he had reviewed by an engineer.

22 ³ A hillside material and labor inventory submitted as evidence by Mr. Herman indicates that the hillside project required 250 yards of concrete, 30 yards of crushed rock, 1,560 landscape blocks, and 120 yards of sand. *Exhibit A-38.*

1 A concrete stairway, eight feet wide in places, was also constructed to replace the historic trail.
2 The stairway was designed to direct stormwater runoff into vegetated areas located behind the
3 concrete retaining walls that formed the sides of the stairway. The concrete walkway along the
4 shoreline also provides some support for the stairs and retaining walls located on the hillside.
5 The hillside was planted with an assortment of plants including arborvitaes, Japanese red leaf
6 maples, river clump birch, golden thread, burning bush, lilac trees, rhododendrons, weeping
7 spruce trees, maple trees, clump birch, weeping larch, rose plants fire top spiareia, vine roses,
8 English ivy, and Austrian pine. A substantial number of these plants are non-native to the area.
9 *Testimony of Herman, Sing, Crowley, Corp, Maher, and Moser. Exs. R-15, R-17, R-18, A-35,*
10 *and A-38.*

11 IX.

12 All of the work done after entry into the settlement was done without any shoreline
13 permits from the county or approval by Ecology. All of the work done on the deck, deck
14 structure, beach stairs, and bulkhead was within the 50-foot setback from Liberty Lake. Portions
15 of the concrete stairway and keystone walls were also within the 50-foot setback. All of the
16 work was well within the 200-foot shoreline jurisdiction area. *Testimony of Anest, Maher,*
17 *Mosher, Herman, and Sing.*

19 X.

20 In the fall of 2003, the County and Ecology became aware of Mr. Herman's actions on
21 his property. Ecology sent Mr. Herman a letter on November 18, 2003, indicating its concern

1 regarding potential shoreline violations and asking for details regarding the work that had been
2 done. *Ex. R-6.* Department of Fish and Wildlife (WDFW) followed up shortly thereafter with a
3 letter expressing its concerns as well. *Ex. R-7.* Mr. Herman responded back by letter on
4 December 30, 2003, describing the work that had been done at his home. *Ex. R-8.* Mr. Herman,
5 and several agency representatives met at his house near the end of January 2004, to look at what
6 improvements had been made on the property. *Testimony of Herman, Maher, and Moser. Exs.*
7 *R-17 and R-18.*

8 XI.

9 On May 17, 2004, Ecology issued Shoreline Violation, Order No. 1038 to Mr. Herman.
10 *Exhibit. R-10.* The order imposed a \$30,000 civil penalty for failure to comply with the prior
11 settlement agreement, and for undertaking development on the shorelines of the state in violation
12 of the Shoreline Management Act (SMA) and the SCSMP. The order required Mr. Herman to
13 cease all filling and construction activities within 200 feet of the ordinary high water mark, and
14 to submit a plan within 30 days detailing how he intended to restore, to the maximum extent
15 feasible, the shoreline of Liberty Lake. Mr. Herman appealed Ecology's order to this Board.
16 *Testimony of Maher. Ex. R-10.*

18 XII.

19 Mr. Herman admits that he did not obtain any shoreline permits for the work done after
20 he entered into the settlement agreement in 1995. Mr. Herman testified that the work he did was
21 to comply with the settlement agreement and therefore he thought additional permits were not

1 needed. Mr. Herman admits that at the time of the agency's visit, and subsequently when
2 Enforcement Order 1038 was issued in May 2004, he had not removed any portion of the historic
3 lift and crane. He testified that he did not remove the lift and crane because the work required a
4 Hydraulic Project Approval (HPA), and a representative from WDFW told him he would not be
5 able to get such a permit. Mr. Herman did not actually apply for an HPA to remove the lift and
6 crane. Sometime in the spring of 2004, after the issuance of Enforcement Order 1038, Mr.
7 Herman removed the top portion of the lift and crane, but not the concrete base. *Testimony of*
8 *Herman.*

9 XIII.

10 Sometime in the spring of 2004, Mr. Herman also had his dock rebuilt. The
11 reconstruction included shortening the dock by approximately 20 feet, changing the shape of the
12 dock to a "T" by adding a wider area on the end, and resurfacing the dock with a plastic decking
13 material. The overall square footage of the dock was not changed. In addition, the Styrofoam
14 blocks under the dock were replaced with de-barked cedar logs. Contractor Bruce Sing did the
15 work on the dock. Mr. Sing testified that he called the County and inquired as to whether a
16 permit was necessary to recondition a dock, and was told one was not required. *Testimony of*
17 *Herman, Sing, Adams and Divens. Exs. A-22 and A-23.*

19 XIV.

20 Any conclusion of law deemed to be a finding of fact is adopted as such. Based on these
21 findings, the board makes the following:

1 CONCLUSIONS OF LAW

2 I.

3 The Board has jurisdiction over the parties and the subject matter of this case under RCW
4 90.58.210(4). The Board hears the case *de novo*. Ecology has the burden of proving that a
5 violation of the SMA and/or the SCSMP has occurred and that the amount of the penalty
6 assessed is reasonable. WAC 461-08-500.

7 II.

8 In any penalty case the Board must resolve two primary questions: (1) Did the alleged
9 violations occur, and, if so, (2) is the penalty assessed for those violations reasonable? In this
10 particular case, two types of violations have been alleged: (a) violations of the 1995 settlement
11 agreement, and (b) activities not addressed in the agreement that independently constitute
12 violations of the SMA and SCSMP. If the Board concludes that any or all of these violations
13 occurred, the Board must address whether the penalty issued for the violations established is
14 reasonable. An additional question presented by the unique facts in this case, the nature of the
15 order issued by Ecology, and the issues identified by the parties in the pre-hearing order, is how
16 the matter of restoration of this site should be addressed.

17 Violations of the 1995 Settlement Agreement⁴
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22 ⁴ This section address issues 1, 3, 4, 6, 13, 14 and 15 from the pre-hearing order.

1 III.

2 The Board concludes that Mr. Herman substantially violated the 1995 settlement
3 agreement.

4 IV.

5 The first sentence of paragraph 1 of the 1995 settlement agreement, allowing Mr. Herman
6 to keep the concrete steps and platform, did not authorize Mr. Herman to increase the width of
7 the concrete steps. Mr. Herman did, however, increase the width of the steps by adding the two
8 sets of side stairs down to the beach.

9 V.

10 The second sentence of paragraph 1 required Mr. Herman to “entirely remove the historic
11 lift and crane to create shallow water fish habitat.” Mr. Herman violated this provision by failing
12 to remove any part of the historic lift and crane until after the issuance of the May 17, 2004,
13 enforcement order.⁵ The Board is not persuaded by Mr. Herman’s argument that he could not
14 remove the lift and crane because he could not obtain an HPA from the WDFW. Mr. Herman
15 offered no evidence to establish that he applied for an HPA to remove the lift and crane, nor did
16 he discuss with Ecology how to proceed in the face of the resistance he claims to have
17 encountered from the WDFW representative.⁶
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20 ⁵ While he did finally remove the lift and crane, he still did not remove the concrete cap.

21 ⁶ The WDFW representative who Mr. Herman claims told him he could not get an HPA was not called to testify at the
22 hearing. The WDFW representative that did testify, Ms. Divins, indicated that a denial for restoration work such as this
would be unlikely.

1 VI.

2 The final sentence of paragraph 1 required Mr. Herman to remove the “fill and stacked
3 rocks under the newly constructed portion of the deck.” Although Mr. Herman did move the fill
4 and rock foundation back about two to four feet from the shoreline, he did not remove the
5 material as required.

6 VII.

7 Paragraph 2 of the settlement agreement required Mr. Herman to remove a portion of the
8 bulkhead on the north side of the deck. Instead of removing any of this bulkhead, he mortared
9 the rocks in the bulkhead, and added a concrete cap on the top. These actions constituted a
10 violation of paragraph 2. As a substitute for the work required in paragraph 2, Mr. Herman
11 testified that he moved the bulkhead on the south side of the deck landward a few feet to create
12 more fish habitat. He also mortared the rocks in the southern bulkhead and added a concrete cap.
13 The “substitution” was not discussed with Ecology, and the Board concludes it does not alleviate
14 the violation caused by the failure to remove a portion of the north bulkhead.

15 VIII.

16 Paragraph 3 of the settlement agreement addressed the deck and cover. The agreement
17 required the removal of a portion of the deck cover and two of the supporting posts. Instead of
18 complying with the agreement, Mr. Herman replaced the deck cover with a much larger peaked
19 roof, approximately 15 feet high. Paragraph 3 of the settlement agreement did allow for the
20 construction of a storage shed to address Mr. Herman’s need to have a secure area to store items.
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1 Instead of a storage shed, however, Mr. Herman created an enclosed structure that is, according
2 to Mr. Herman, intended to be a replica of the old Liberty Lake Pavillion. The structure contains
3 amenities unnecessary for its use as a storage shed.

4 IX.

5 Paragraph 4 of the settlement agreement required Mr. Herman to plant native vegetation
6 to stabilize the hillside slope. The Board concludes that the contractor hired by Mr. Herman to
7 do the bank stabilization work did not make a reasonable effort to comply with this requirement.
8 A significant portion of the vegetation planted was non-native.

9 X.

10 Mr. Herman's actions following entry into the agreement were in violation of almost
11 every provision of the agreement, and contrary to the overall intent of the agreement, which was
12 to reduce the shoreline development existing on the Herman site in 1995. Instead, Mr. Herman
13 increased significantly the development of the shoreline area on his property subsequent to the
14 entry of the settlement agreement.

15 Activities Independent of the Settlement Agreement which violate the SMA and SCSMP⁷

16 XI.

17 In addition to being charged with violations of the 1995 settlement agreement, Ecology
18 and the County allege that much of the development undertaken by Mr. Herman on his property
19 after 1995, not addressed in the settlement agreement, was in violation of the SMA and the
20

21 _____
22 ⁷ This section addresses issues 5, 7 and 8 from the pre-hearing order.

SCSMP. Ecology and the County contend that the development was (1) substantial development undertaken without a shoreline permit, and (2) included prohibited structures built within 50 feet of the ordinary high water mark.

XII.

The Shoreline Management Act (SMA) defines “development” to be:

A use consisting of the construction or exterior alteration of structures; dredging; drilling; dumping; filling; removal of any sand, gravel, or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this chapter at any state of water level;

RCW 90.58.030(3)(d). “Substantial development” is further defined to mean

any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state . . .

RCW 90.58.030(3)(e). RCW 90.58.140 prohibits undertaking a substantial development within a shoreline of the state without first obtaining a shoreline substantial development permit.

The concrete stairway and keystone retaining walls were constructed after the 1995 settlement agreement, and were not addressed by the agreement. They cost more than \$5,000, and were located within 200 feet of the shoreline. Therefore, their construction constituted a substantial development within the shoreline area that required appropriate permitting.

The concrete stairway and retaining walls also meet the definition of structure under the SMA. WAC 173-27-030(15) defines structure as “a permanent or temporary edifice or building, or any piece of work artificially built or composed of parts joined together in some definite

1 manner . . .” In general, the SCSMP prohibits structures within 50 feet of the ordinary high-
2 water mark. SCSMP Use Regulations, Section 5, 5.10, p. 4-8. Exceptions to this general rule
3 are provided for certain structures, including piers, docks, buildings relating to recreational
4 developments, and those structures “proven to be otherwise necessary in the public interest and
5 authorized by and consistent with this program.” Therefore, portions of the stairway and
6 retaining walls were unlawfully constructed.

7 The Board concludes that Ecology has met its burden of proof in establishing that the
8 construction of the concrete stairway and retaining walls without a permit violated the SMA and
9 SCSMP.

10 Potential Defenses to the Violations⁸

11 XIII.

12 Mr. Herman makes three primary arguments to support his position that the
13 improvements made to the property since 1995 are not violations as alleged by Ecology. First,
14 he argues that the work he performed was directed and authorized by the settlement agreement.
15 Second, he argues that the work constituted maintenance and was therefore exempt from
16 permitting requirements under the SMA. Third, he argues that the structures at issue are legal
17 nonconforming uses.

18 XIV.

19 The Board has already concluded that the work done on the deck structure, the side stairs
20 leading from the deck to the beach, the bulkheads (both to the north, underneath, and to the south
21

1 of the deck structure) and the plantings for slope stabilization on the hillside, contrary to being
2 allowed by the settlement agreement, violated the settlement agreement. *See CCL III through X.*
3 Mr. Herman testified he was in compliance with the 8-foot height limit in the settlement
4 agreement because the inside ceiling height of the 15-foot pavilion structure was approximately
5 8 feet high. This runs counter to common sense and the SMA, which regulates the overall height
6 of uses and developments in relation to “height above average grade level.” *RCW 90.58.340.*

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XV.

The Board further concludes that the work undertaken by Mr. Herman to stabilize the
bank, other than the plantings, was not authorized by the settlement agreement. The settlement
agreement referenced only “planting of native vegetation consistent with the pedestrian trail for
stabilization of the bank.” *Ex. R-5.* Besides planting non-native vegetation, the bank
stabilization work included the replacement of the railroad ties with keystone retaining walls, and
the replacement and expansion of the historic trail with the wider concrete steps and walls. This
work was not addressed in, or authorized by, the settlement agreement.

XVI.

The Board is similarly not persuaded by Mr. Herman’s second defense, that the work he
performed constituted maintenance or repair. The shoreline regulations do provide an exemption
from the substantial development permitting requirements for “normal maintenance or repair of
existing structures or developments.” *WAC 173-27-040(2)(b).* The rule goes on to state:

⁸ This section addresses issues 9, 10, 11, 12 and 16 from the pre-hearing order.

1 'Normal maintenance' includes those usual acts to prevent a decline, lapse, or cessation
2 from a lawfully established condition. 'Normal repair' means to restore a development to
3 a state comparable to its original condition, including but not limited to its size, shape,
4 configuration, location and external appearance, within a reasonable period after decay or
5 partial destruction, except where repair causes substantial adverse effects to shoreline
6 resource or environment. Replacement of a structure or development may be authorized
7 as repair where such replacement is the common method of repair for the type of
8 structure or development and the replacement structure or development is comparable to
9 the original structure or development . . .

10 The improvements on Mr. Herman's property since 1995 go well beyond anything that
11 could be construed as normal maintenance or repair. The deck structure is larger than before and
12 has changed significantly in its external appearance. The bulkhead is taller, more visible, and
13 more permanent, due to the concrete capping and mortaring. The walkways, railings, and lights
14 on the shoreline were not there before, and neither were many of the hillside retaining walls.
15 The retaining walls that did pre-exist the 1995 settlement were built of railroad ties, and were
16 much less visible on the hillside than the new ones constructed with keystone blocks. The prior
17 hillside pathway was narrower and more natural in construction. The current pathway is wider,
18 concrete, and very visible on the hillside. Overall, the effect is to both expand existing
19 structures, and to build new structures. The Board concludes that this is not exempt maintenance
20 and repair, but is construction subject to shoreline permitting

21 XVII.

22 Mr. Herman's third argument is also without merit. The SMA and shoreline rules do
recognize an exemption from permitting requirements for legal nonconforming use or

development; however, the development undertaken by Mr. Herman fails to meet the requirements of the exemption.

WAC 173-27-080 defines “nonconforming use or development” to mean:

a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program.

The rule provides further that:

(2) Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

The testimony at the hearing established that at the time Mr. Herman purchased this property from his father in 1970, it was already developed with a trail down to the beach, a rock bulkhead, a platform and dock. Significant expansion and modification of the bulkhead and the platform had occurred by the time of the first enforcement action in 1995. The settlement agreement, entered into between the parties, recognized and documented that portions of the bulkhead and the platform could remain, probably because they were pre-existing. The settlement agreement, however, required removal of expansions to those structures.

As already discussed, Mr. Herman did not comply with this agreement. Instead of removing the expansions to the pre-existing, nonconforming structures as required by the settlement agreement, Mr. Herman proceeded further to expand and modify significantly the structures that were the subject of the settlement agreement, and to add new structures. The

Board concludes that only the structures allowed to remain in the 1995 settlement agreement (the concrete steps and platform, portions of the bulkhead, a portion of the deck and deck structure, and the pedestrian trail with native vegetation) can be considered pre-existing non-conforming uses. To the extent the legal nonconforming uses were expanded, such work was subject to shoreline permitting.

Ecology has met its burden in establishing that Mr. Herman's activities in the shoreline area since 1995 violated the settlement agreement, and also was subject to shoreline permitting under the SMA and SCSMP.

Reasonableness of the Penalty⁹

XVIII.

The Board considers three factors when it evaluates the reasonableness of a penalty. These factors are: (1) the nature of the violation, (2) the prior history of the violator, and (3) the remedial actions taken by the penalized party. *Kaiser Aluminum and Chemical v. Ecology*, PCHB No. 99-121 & 99-135 (2000). Given the facts in this case, the Board finds that the \$30,000 penalty issued by Ecology is reasonable.

XIX.

Mr. Herman knew, at least after his first encounter with Ecology and the County in 1993, that his activities on his lakefront property were subject to shoreline regulations. In 1995, he signed a settlement agreement in which he committed to taking certain actions on his property.

⁹ This section addresses issue 2, 17 and 18 from the pre-hearing order.

1 Despite making this commitment, and being aware of the shoreline regulations, Mr. Herman then
2 proceeded to ignore the settlement agreement, and to move forward with significant additional
3 development in the shoreline area without obtaining necessary shoreline permits. This same
4 pattern of ignoring agency regulations was demonstrated again in the spring of 2004, when Mr.
5 Herman proceeded to have his dock replaced without working with the appropriate permitting
6 agencies. This occurred the spring after Ecology and the County had visited with Mr. Herman at
7 his home in January 2004, and informed him of their view that his activities after 1995
8 constituted violations of the shoreline rules and settlement agreement. The Board has stated
9 "[t]he central function of a civil penalty is to encourage compliance with the law." *Lewis v.*
10 *Ecology and San Juan County*, SHB No. 95-53 (1997). The Board concludes that a significant
11 penalty is warranted here to achieve that end.

12 XX.

13 Mr. Herman argues that the violations that occurred did not damage important fish
14 habitat, and therefore the penalty amount is excessive. The Board tends to agree with Mr.
15 Herman that significant damage to fish habitat was not demonstrated. However, such a finding
16 is not necessary to support this penalty, in light of the presence of a pattern of disregard for the
17 shoreline regulations demonstrated by the facts in this case. The Board concludes a \$30,000
18 civil penalty is reasonable.

19 Restoration of the Site

XXI.

Besides imposing a \$30,000 civil penalty for shoreline violations, Ecology set out two additional requirements in Order 1038. First, it imposed a stop work order on Mr. Herman's activities within 200 feet of the ordinary high water mark until he obtained a shoreline permit authorizing the activities. Second, it required submission of a plan to restore, to the maximum extent possible, the shoreline of Liberty Lake. In its closing argument submitted in writing after the hearing, Ecology requested that the Board affirm its requirement that a plan be submitted. Also in its closing argument, Ecology specified for the first time the elements of the restoration plan which should be required. Mr. Herman, although not opposed to submission of a plan, argues first, that the plan should not address the hillside stabilization and stormwater system because it was not part of Order 1038, and second, that it would be premature for the Board to impose specific requirements for a plan because the plan has not yet been submitted.

XXII.

The Board rejects both of these arguments. Although Ecology's Order 1038 did not address as directly as it could have, the bank stabilization work undertaken by Mr. Herman, it was clear at the hearing that Mr. Herman was aware that the bank stabilization work was at issue. Mr. Herman presented testimony from Mr. Sing, the contractor that designed the hillside improvements, regarding the hillside construction that had been done. Dr. Corp, an engineer and expert consultant, also testified on behalf of Mr. Herman. Dr. Corp offered expert testimony and

1 opinions regarding the hillside stabilization and storm control measures, Mr. Herman cannot now
2 claim that the restoration order cannot be required to address that area of his property.

3 XXIII.

4 Mr. Herman also argues that the Board does not have jurisdiction to require that certain
5 elements be contained in the restoration plan because a restoration plan has not been submitted.
6 In support of this argument, Mr. Herman sites to a prior shoreline case, *Lewis v. Ecology*, SHB
7 No. 95-53. As Ecology points out in response, it appears that in *Lewis*, Ecology's order only
8 assessed a penalty, and did not require the submission of a restoration plan. Here, however,
9 Order 1038 does require the submission of a restoration plan. Mr. Herman was on notice that
10 submission of a restoration plan was an issue before the Board, and the legal issues in the case
11 require the Board to determine the fate of specific shoreline structures that would be subject to a
12 restoration plan. In light of this fact, the Board concludes that it does have jurisdiction to require
13 that the restoration plan, when submitted, contain certain elements.

14 XXIV.

15 This case is unique because Ecology's order did not proscribe which structures had to be
16 removed or modified in order for the restoration plan to be approved, and this information was
17 not provided until the closing argument. While the Board concludes that the requirement for the
18 restoration plan is valid, the Board can only determine the scope of the restoration plan,
19 including the fate of specific shoreline structures identified in legal issues in this appeal.
20 However, the Board cannot make the necessary technical and scientific determinations and
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1 construction conditions necessary for the restoration plan and shoreline permits, as that role
2 belongs to Spokane County and Ecology as the permitting authorities.

3 XXV.

4 The structures that must be removed or modified in the restoration plan are those
5 prohibited or limited by the 1995 Settlement Agreement. Specifically, the deck structure must be
6 reduced in size to 22 feet by 11 feet four inches, the height of the building must be reduced to 8
7 feet, the two side stairs of the concrete stairway must be removed, and the northern portion of the
8 bulkhead must be removed.

9 XXVI.

10 The modified structures that may lawfully remain are the concrete cap and iron railing
11 added to the bulkhead, the cement pad and wall under the structure, and the associated
12 modifications to the structure other than the height and dimensions that must be modified to be
13 consistent with the 1995 Settlement Agreement. The basis for these modified structures being
14 allowed to remain is that the modifications were done to structures that were lawfully established
15 and allowed to remain under the 1995 Settlement Agreement. The modifications to these lawful
16 structures, however, were not exempt as they enlarged the structures rather than being
17 maintenance or repair. Nor could each of the individual modifications be considered in isolation
18 to be within the exemption threshold, as the modifications are part of a single integrated
19 construction project subject to shoreline permitting.
20

1 XXVII.

2 The Board concludes that the concrete cap and iron railing added to the bulkhead, the
3 cement pad and wall under the structure, and the associated modifications to the structure (toilet,
4 shower, grinder pump, sink, refrigerator, and associated plumbing and wiring) qualify for a
5 shoreline substantial development permit under the SCSMP and SMA. Under the SCSMP, the
6 Urban Area designation relates to “uses which are water-dependent and can provide visual
7 and/or safe access to the waterfront.” *SCSMP at 2-3*. The criteria and objectives for the Urban
8 Area include “intensive, water-oriented recreational use of the shoreline.” *SCSMP 4-27*. The
9 SCSMP policies and conditions applicable to the modified bulkheads include providing access to
10 shorelines, providing erosion control, and providing private access to watercraft. *SCSMP 3-15*;
11 *4-25*. These modifications to the bulkhead and structure do not extend further into Liberty Lake,
12 increase the safety and water access provided by the bulkhead, and minimize the need for
13 ongoing maintenance of the bulkhead. These modifications also meet the policies of the SMA at
14 RCW 90.58.020, including encouraging water access and recreation without impacting the
15 shoreline environment.

16 XXVIII.

17 The Board cannot determine whether or to what extent the existing concrete stairs,
18 concrete retaining walls, and keystone block walls will remain in the restoration plan. However,
19 Mr. Herman is lawfully entitled to have some type of stairs to access the shoreline, and to have
20 retaining walls to properly stabilize the slope at his property. Mr. Herman’s rights to have these
21

1 structures is based on the existence of the original trail, stairs, and timber retaining walls at the
2 property, and the Board factual findings regarding existence of slope stability concerns at the
3 site. However, the ultimate configuration of the stairs and retaining walls in the restoration plan
4 will involve technical and permitting considerations that go beyond both the evidence presented
5 in this case and the appropriate role of the Board in this case.

6 XXIX.

7 Any finding of fact deemed to be a conclusion of law is hereby adopted as such.

8 From the foregoing, the Board issues this:

9 ORDER

- 10 1. The \$30,000 civil penalty, assessed against Mr. Herman in Order 1038, is affirmed.

11 However \$10,000 of the \$30,000 is hereby suspended for one year from the date of this
12 order. If, within one year, Mr. Herman has fully complied with the provisions of this
13 order, the \$10,000 is waived. If Mr. Herman has not fully complied, the \$10,000
14 becomes due at that time.

- 15 2. Consistent with the cease and desist order contained in Enforcement Order 1038 and this
16 Order, Mr. Herman shall apply for and obtain all permits and/or hydraulic project
17 approvals necessary to make the changes on the property required by this Order prior to
18 performing any of the work on the ground.

- 19 3. The scope of the restoration plan and permit applications developed by Mr. Herman shall
20 be as follows:
21

1 (a) Mr. Herman may retain the deck structure, but it must be reduced in size. The
2 structure's roof must be reduced to a maximum height of eight feet. The area
3 enclosed by the structure, and covered by the roof, must be reduced to 22 feet in
4 width and 11 feet 4 inches in depth. The cement pad and wall underneath the
5 structure may remain as they exist now. The deck structure may contain a toilet,
6 shower, grinder pump, sink, refrigerator, and associated plumbing and wiring as
7 they exist today.

8 (b) Mr. Herman may retain the concrete steps going down to the dock from the
9 concrete deck, but the two flights of steps on the sides of the main steps, which go
10 down to the beach, must be removed.

11 (c) Mr. Herman may retain the concrete walkway and railing only up to the end of
12 the current iron railing. All concrete must be removed from the end of the iron
13 railing northward along the shoreline. This includes the concrete cap on the
14 bulkhead, and the concrete pier where the boat lift and crane used to be. Mr.
15 Herman may add only those minimal steps necessary, from the end of the
16 remaining concrete walkway, to allow pedestrian access to the beach.

17 (d) Mr. Herman may retain all other currently existing bulkheads, not mentioned
18 above.

- 19
20 4. Approval of Mr. Herman's permit applications and restoration plan shall be
21 contingent upon:

1 (a) Preparation by a qualified consultant to Mr. Herman of an adequate
2 stormwater management plan that meets all Liberty Lake Sewer and Water
3 District requirements for both new and existing construction.
4 (b) Preparation by a qualified consultant to Mr. Herman of a planting plan
5 consisting of native vegetation, and Ecology approval of that plan.
6 (c) Preparation by a qualified geotechnical engineer, mutually agreed upon by
7 Ecology and Mr. Herman, of an evaluation of the concrete stairs, walls, and
8 keystone block retaining walls on the hillside. The purpose of the evaluation will
9 be to determine which structures are necessary and appropriate for access and
10 bank stabilization, and which may be safely removed or modified. Once the
11 evaluation is obtained, and after obtaining the necessary permits, Mr. Herman will
12 remove the structures that are safe to remove or modify according to the
13 recommendations made by the engineer and the permits issued by Spokane
14 County.
15

- 16 5. Issuance of permits by Spokane County shall be consistent with this Order,
17 though Spokane County retains the discretion in WAC 173-27-150(2) to attach
18 conditions to the approval of permits as necessary to assure consistency of the
19 project with the SMA and the Spokane County Shoreline Master Program.

20 Done this 27th day of July 2005.
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